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FILED

APR 26 2010

**SECRETARY, BOARD OF
OIL, GAS & MINING**

**BEFORE THE BOARD OF OIL, GAS AND MINING
DEPARTMENT OF NATURAL RESOURCES
STATE OF UTAH**

UTAH CHAPTER OF THE SIERRA CLUB,
SOUTHERN UTAH WILDERNESS
ALLIANCE, NATURAL RESOURCES
DEFENSE COUNCIL, and NATIONAL
PARKS CONSERVATION ASSOCIATION,

Petitioners,

DIVISION OF OIL, GAS AND MINING,

Respondent,

ALTON COAL DEVELOPMENT, LLC

Intervenors,

**NOTICE OF
NEW
PERMIT CONDITION FOR
CULTURAL RESOURCE
PROTECTION
AND
MOTION TO DEFER BOARD
ACTION**

Docket No. 2009-019
Cause No. C/025/0005

The Division of Oil, Gas, and Mining (Division), by and through its counsel hereby gives NOTICE to all parties and to the Board of Oil Gas and Mining (Board) that has advised ACD that a Condition to the permit for the Coal Hollow Mine will require that ACD mitigate or avoid two cultural resource sites within the permit area that were inadvertently omitted from the identification and consultation process required for the permit.

The Division has determined based on an April 20, 2010 meeting with ACD that two archeological sites within the permit area that had been identified by cultural resource surveys

and found eligible for listing on the National Register of Historic Places were not been previously identified as part of the permit review and consultation with the SHPO. ACD and the Division had erroneously believed that the entire permit area had been inventoried by the two earlier cultural resource surveys and believed that a third survey only was of federal lands. ACD notified the Division at the meeting that it had confirmed that the third survey did include a portion of the lands within the Permit Area that had not been surveyed and that there was a site identified that would be affected. ACD also advised the Division that, in confirming this finding, they had determined that the cultural resources consultation had failed to include another previously identified archeological site within the permit area.

R645-300-133.600 requires that the Division make a finding that it has “taken into account the effect of the proposed permitting action on the properties listed on and eligible for listing on the National Register of Historic Place.” This rule further provides that this “finding may be supported in part by the inclusion of appropriate permit conditions or changes in the operation plan protecting historic resources, or a documented decision that the Division has determined that no additional protection measures are necessary.” Accordingly, the Division has advised ACD by letter dated April, 20, 2010 (attached as Exhibit 1) that a condition of the permit will require ACD to proceed with consultation regarding the identification and eligibility of the two additional sites, and that ACD will take appropriate mitigation measures or avoid the sites as determined by the Division in consultation with the SHPO. The Division advised the SHPO of the error and need for concurrence regarding the identification and effect for these two sites by letter dated April 21, 2010. (Exhibit 2) The Division has apprised counsel for the Petitioners of

these developments as promptly as reasonable by email and has provided copies of these two letters electronically as soon as they had been sent.

Since neither the Division nor the Petitioners were aware of the need for this new condition when the List of Issues was presented on April 19, 2010, the pleadings with regard to compliance for the Permit Area no longer reflect the current facts. Peitioners Identification of Issues #1 asks the Board to determine if the Division's determination of eligibility and effect covered the entire permit area. The Division has conceded that it does not. Previously the Division opposed the consideration, since it was outside of the PNHD issue, the only issue raised in the initial RAA. However, these new facts certainly give a right for the Petitioners to assert the issue now.

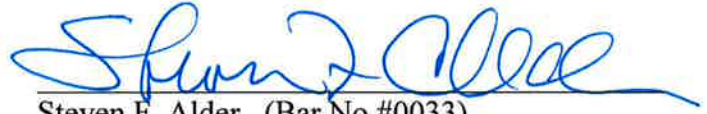
R645-301-411.144 allows the Division to "require the applicant to protect historic or archeological properties . . . through appropriate mitigation and treatment measures . . . taken after the permit issuance provided the required measures are completed before the properties are affected by any mining operation." Accordingly, the time will allow for the proposal of appropriate mitigation but need not require completion and so allow for Boar approval. The Division believes that there is sufficient time prior to the May 22, 2010 hearing date for the parties to be apprised of the facts and for the SHPO to make its required consultations.

MOTION TO DEFER BOARD ACTION

In order for the parties to be able to more fully address the issue, the Division asks that the Board defer the hearing on this issue. Deferring action will allow the SHPO to respond to the request for concurrence regarding the identification and effect and will permit petitioners to

respond to the addition of the condition to the permit. The Division believes that that this can occur prior to the May 22, 2010 hearing date.

Respectfully submitted this 24 day of April, 2010



Steven F. Alder, (Bar No #0033)

Fredric J. Donaldson, (Bar No #12076)

Assistant Attorney General

Counsel for Division of Oil, Gas and Mining

CERTIFICATE OF MAILING

I hereby certify that I caused a true and correct copy of the foregoing Request for Agency Action, to be mailed by first class mail, postage prepaid, the 26 day of APRIL, 2010 to:

Denise Dragoo
James Allen
SNELL & WILMER, LLP
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Salt Lake City, UT 84101

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Michael Johnson
1594 West North Temple Suite 300
Salt Lake City, UT 84116

William Bernard
Kane County Attorney
78 North Main Street
Kanab, UT 84741



Exhibit 1



GARY R. HERBERT
Governor

GREGORY S. BELL
Lieutenant Governor

State of Utah

DEPARTMENT OF NATURAL RESOURCES

MICHAEL R. STYLER
Executive Director

Division of Oil, Gas and Mining

JOHN R. BAZA
Division Director

April 20, 2010

Chris R. McCourt
Alton Coal Development, LLC
463 North 100 West, Suite 1
Cedar City, Utah 84720

Subject: Decision and Cultural Resource Protection Finding for Coal Hollow Mine Permit,
Alton Coal Development, LLC, Coal Hollow, C/025/005

Dear Mr. McCourt:

This letter is to advise Alton Coal Development that the Division's October 19, 2009 permit decision regarding the proposed Coal Hollow Mine will be further conditioned to require the identification and protection of two additional cultural resource sites within the permit area. The Division appreciates ACD bringing to the Division's attention apparent oversights on the part of ACD and the Division that have resulted in these two cultural resource sites within the permit area not being included in our prior identification and findings.

The written findings required for approval of the permit application include R645-300-133.600, [T]he Division has taken into account the effect of the proposed permitting action on properties listed on and eligible for listing on the national Register of Historic Places. This finding may be supported in part by inclusion of appropriate permit conditions or changes in the operation plan protecting historic resources, or a documented decision that the Division has determined that no additional protection measures are necessary. In order to make this finding, the Division will add a condition that ACD will provide for the protection of these resources either by acceptable mitigation as determined by the Division with the concurrence of the SHPO or modification of the mine plan to avoid these sites. The Division will immediately provide the SHPO with the surveys that support the identification of these two sites and seek its concurrence in the identification and determination of eligibility.

The provisions of R645-301-411.144 allow for the Division to require the ACD to protect historic or archeological properties listed on or eligible for listing through appropriate mitigation and treatment measures after the permit issuance provided the measures are completed before the properties are affected by any mining operation. Since the SHPO must concur in the Division's determination, a permit condition must include the obligation of ACD to avoid the site as a possible and necessary action to protect the sites.

Since the permit is now being challenged in an appeal before the Board, the Division intends to immediately advise the Board and the parties that the Division intends to add this condition to the permits terms.

If you have any question regarding this letter or our determination, please contact me at (801) 538-5320, or Daron Haddock at (801) 538-5325.

Sincerely,

A handwritten signature in black ink, appearing to read 'Dana Dean', with a long horizontal flourish extending to the right.

Dana Dean
Associate Director-Mining

DD/dd

Cc: Steve Alder, AG
Denise Dragoo, Snell and Wilmer
Price Field Office

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Exhibit 2



JON M. HUNTSMAN, JR.
Governor

GARY R. HERBERT
Lieutenant Governor

State of Utah

DEPARTMENT OF NATURAL RESOURCES

MICHAEL R. STYLER
Executive Director

Division of Oil, Gas and Mining

JOHN R. BAZA
Division Director

April 21, 2010

Wilson Martin, Assistant Director
State Historic Preservation Office
300 Rio Grande
Salt Lake City, Utah 84101

Dear Mr. Martin:

This letter is to inform you that the Division of Oil, Gas and Mining has been advised by Alton Coal Development, LLC (ACD) that the Division has failed to include two archeological sites in the previous requests for your concurrence regarding the surveys and mitigation for the Coal Hollow Mine. We recently sent you a formal letter as well as an email seeking clarification of the prior concurrences and wish to make our record clear prior to your reply. It has just been brought to our attention by ACD that a survey dated July 10, 2008 by Montgomery Archeological Consultants of 440 acres in the Alton Amphitheater (that included 80 acres within the proposed Coal Hollow mine permit area) had inadvertently not been submitted to the Division.

The Division and ACD had mistakenly understood that these 80 acres had been included in one of the two prior surveys completed in association with the approval for this mine and the BLM requested cultural resource survey associated with leasing of federal coal in this area. This latest survey has identified another archeological site that is within the permit area. This site is identified as 42Ka6505 in the report. In addition, in researching this discrepancy ACD has determined that the Division failed to include in its identification and request for concurrence a site that had been identified in the previous BLM survey. This site is identified as 42Ka6093. We are adding these two sites to the Determinations of Eligibility and Effect Table that we had previously submitted to you. We believe the following table now provides an accurate account of the sites that could be affected by the proposed mining operation and all of these sites are located within or partially within the proposed permit area.

Table 1 – Determinations of Eligibility and Effect

Site Number	NRHP Determination	Effect Determination
42KA1313	Eligible	No Effect (will be avoided)
42KA2041	Eligible	No Effect (will be avoided)
42KA2042	Eligible	Adverse Effect (mitigated)
42KA2043	Eligible	No Effect (will be avoided)
42KA2044	Eligible	Adverse Effect (mitigated)
42KA2068	Eligible	Adverse Effect (mitigated)

42KA6104	Eligible	Adverse Effect (mitigated)
42KA6105	Eligible	Adverse Effect (mitigated)
42KA6106	Eligible	Adverse Effect (mitigated)
42KA6107	Eligible	Adverse Effect (mitigated)
42KA6108	Eligible	Adverse Effect (mitigated)
42KA6109	Eligible	No Effect (will be avoided)
42KA6110	Eligible	No Effect (will be avoided)
42KA6124	Not Eligible	
42KA6126	Eligible	No Effect (will be avoided)
42KA6505	Eligible	Adverse Effect (pending)
42KA6093	Eligible	Adverse Effect (pending)

We are proposing that the SHPO concur with the identification and effect for these two additional sites. Please provide your concurrence with our determination at your earliest convenience. We will subsequently seek concurrence in our proposed mitigation. The mine permit will be conditioned on protecting these two sites either by avoidance or by approved mitigation.

Sincerely,



Daron R. Haddock
Coal Program Manager